

Federal Deposit Insurance Corporation

§ 325.6

basis where it is deemed appropriate for safety and soundness purposes.

[56 FR 10163, Mar. 11, 1991, as amended at 57 FR 7647, Mar. 4, 1992; 58 FR 6369, Jan. 28, 1993; 58 FR 8219, Feb. 12, 1993; 60 FR 8187, Feb. 13, 1995; 60 FR 39232, Aug. 1, 1995; 63 FR 42677, Aug. 10, 1998; 66 FR 59652, Nov. 29, 2001; 65 FR 3804, Jan. 25, 2002; 73 FR 79606, Dec. 30, 2008]

§ 325.6 Issuance of directives.

(a) *General.* A directive is a final order issued to a bank that fails to maintain capital at or above the minimum leverage capital requirement as set forth in §§ 325.3 and 325.4. A directive issued pursuant to this section, including a plan submitted under a directive, is enforceable in the same manner and to the same extent as a final cease-and-desist order issued under 12 U.S.C. 1818(b).

(b) *Issuance of directives.* If a bank is operating with less than the minimum leverage capital requirement established by this regulation, the Board of Directors, or its designee(s), may issue and serve upon any insured state non-member bank a directive requiring the bank to restore its capital to the minimum leverage capital requirement within a specified time period. The directive may require the bank to submit to the appropriate FDIC regional director, or other specified official, for review and approval, a plan describing the means and timing by which the bank shall achieve the minimum leverage capital requirement. After the FDIC has approved the plan, the bank may be required under the terms of the directive to adhere to and monitor compliance with the plan. The directive may be issued during the course of an examination of the bank, or at any other time that the FDIC deems appropriate, if the bank is found to be operating with less than the minimum leverage capital requirement.

(c) *Notice and opportunity to respond to issuance of a directive.* (1) If the FDIC makes an initial determination that a directive should be issued to a bank pursuant to paragraph (b) of this section, the FDIC, through the appropriate designated official(s), shall serve written notification upon the bank of its intent to issue a directive. The notice shall include the current Tier 1 leverage capital ratio, the basis upon

which said ratio was calculated, the proposed capital injection, the proposed date for achieving the minimum leverage capital requirement and any other relevant information concerning the decision to issue a directive. When deemed appropriate, specific requirements of a proposed plan for meeting the minimum leverage capital requirement may be included in the notice.

(2) Within 14 days of receipt of notification, the bank may file with the appropriate designated FDIC official(s) a written response, explaining why the directive should not be issued, seeking modification of its terms, or other appropriate relief. The bank's response shall include any information, mitigating circumstances, documentation or other relevant evidence which supports its position, and may include a plan for attaining the minimum leverage capital requirement.

(3) After considering the bank's response, the appropriate designated FDIC official(s) shall serve upon the bank a written determination addressing the bank's response and setting forth the FDIC's findings and conclusions in support of any decision to issue or not to issue a directive. The directive may be issued as originally proposed or in modified form. The directive may order the bank to:

- (i) Achieve the minimum leverage capital requirement established by this regulation by a certain date;
- (ii) Submit for approval and adhere to a plan for achieving the minimum leverage capital requirement;
- (iii) Take other action as is necessary to achieve the minimum leverage capital requirement; or
- (iv) A combination of the above actions.

If a directive is to be issued, it may be served upon the bank along with the final determination.

(4) Any bank, upon a change in circumstances, may request the FDIC to reconsider the terms of a directive and may propose changes in the plan under which it is operating to meet the minimum leverage capital requirement. The directive and plan continue in effect while such request is pending before the FDIC.

(5) All papers filed with the FDIC must be postmarked or received by the

appropriate designated FDIC official(s) within the prescribed time limit for filing.

(6) Failure by the bank to file a written response to notification of intent to issue a directive within the specified time period shall constitute consent to the issuance of such directive.

(d) *Enforcement of a directive.* (1) Whenever a bank fails to follow the directive or to submit or adhere to its capital adequacy plan, the FDIC may seek enforcement of the directive in the appropriate United States district court, pursuant to 12 U.S.C. 3907(b)(2)(B)(ii), in the same manner and to the same extent as if the directive were a final cease-and-desist order. In addition to enforcement of the directive, the FDIC may seek assessment of civil money penalties for violation of the directive against any bank, any officer, director, employee, agent, or other person participating in the conduct of the affairs of the bank, pursuant to 12 U.S.C. 3909(d).

(2) The directive may be issued separately, in conjunction with, or in addition to, any other enforcement mechanisms available to the FDIC, including cease-and-desist orders, orders of correction, the approval or denial of applications, or any other actions authorized by law. In addition to addressing a bank's minimum leverage capital requirement, the capital directive may also address minimum risk-based capital requirements that are to be maintained and calculated in accordance with appendix A to this part.

[56 FR 10164, Mar. 11, 1991]

Subpart B—Prompt Corrective Action

SOURCE: 57 FR 44900, Sept. 29, 1992, unless otherwise noted.

§ 325.101 Authority, purpose, scope, other supervisory authority, and disclosure of capital categories.

(a) *Authority.* This subpart is issued by the FDIC pursuant to section 38 (section 38) of the Federal Deposit Insurance Act (FDI Act), as added by section 131 of the Federal Deposit Insurance Corporation Improvement Act of

1991 (Pub. L. 102-242, 105 Stat. 2236 (1991)) (12 U.S.C. 1831o).

(b) *Purpose.* Section 38 of the FDI Act establishes a framework of supervisory actions for insured depository institutions that are not adequately capitalized. The principal purpose of this subpart is to define, for FDIC-insured state-chartered nonmember banks, the capital measures and capital levels, and for insured branches of foreign banks, comparable asset-based measures and levels, that are used for determining the supervisory actions authorized under section 38 of the FDI Act. This subpart also establishes procedures for submission and review of capital restoration plans and for issuance and review of directives and orders pursuant to section 38.

(c) *Scope.* This subpart implements the provisions of section 38 of the FDI Act as they apply to FDIC-insured state-chartered nonmember banks and insured branches of foreign banks for which the FDIC is the appropriate Federal banking agency. Certain of these provisions also apply to officers, directors and employees of those insured institutions. In addition, certain provisions of this subpart apply to all insured depository institutions that are deemed critically undercapitalized.

(d) *Other supervisory authority.* Neither section 38 nor this subpart in any way limits the authority of the FDIC under any other provision of law to take supervisory actions to address unsafe or unsound practices, deficient capital levels, violations of law, unsafe or unsound conditions, or other practices. Action under section 38 of the FDI Act and this subpart may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the FDIC, including issuance of cease and desist orders, capital directives, approval or denial of applications or notices, assessment of civil money penalties, or any other actions authorized by law.

(e) *Disclosure of capital categories.* The assignment of a bank or insured branch under this subpart within a particular capital category is for purposes of implementing and applying the provisions of section 38. Unless permitted by the FDIC or otherwise required by law, no bank may state in any advertisement